Fair Up Or Down Vote

May 27, 2005

Senator Hatch, "Nuclear Option Still on the Table," Human Events, 5/27/05

Noteworthy

Sen. Frist Decries Democrats Filibuster Of John Bolton. "Some 72 hours after hailing an agreement that sought to end partisan filibusters, the Democrats have launched yet another partisan filibuster…. Given the change to advance the cause of comity in the Senate, the Democrats have chosen partisan confrontation over cooperation." (Mary Curtius, "Senate Delays Vote On Bolton," *Los Angeles Times*, 5/27/05)

Sen. Pat Roberts (R-KS) Asserts That The Filibuster Of Bolton Undermines The Spirit Of The Judicial Compromise. "John Bolton is in extraordinary-circumstance purgatory right now." (Mary Curtius, "Senate Delays Vote On Bolton," *Los Angeles Times*, 5/27/05)

Sen. Trent Lott (R-MS) Maintains That The Blockage Of Bolton's Nomination Was A "Setback" To The Compromise On Judicial Nominations. "[Thursday's vote] was a setback for the compromise that was reached … it certainly has strained the relationship between our leaderships." (Mary Curtius, "Senate Delays Vote On Bolton," *Los Angeles Times*, 5/27/05)

"Nuclear Option Still on the Table"

Human Events

by Sen. Orrin G. Hatch
Posted May 27, 2005

The judicial filibuster agreement reached by a group of 14 Republican and Democratic senators may be a truce, but it is not a treaty.

It remains to be seen if the Senate's tradition of up-or-down votes for judicial nominations will be re-established. And make no mistake, every tool for returning to that tradition remains on the table. As Majority Leader Bill Frist and even some signatories to this agreement have acknowledged, this includes the constitutional option.

Those who founded this republic designed the Senate without the minority's being able to filibuster anything at all. After a rules change made the filibuster possible, the Senate reserved its use to the legislative calendar and by tradition did not use it for judicial nominees. We could have used the filibuster to prevent confirmation of judicial nominations, but we did not do so.

In 2003, after 214 years, that tradition changed when Democrats blocked confirmation of 10 majority-supported appeals court nominees by preventing any confirmation vote at all.

The ends, however, do not justify the unconstitutional means. We must restore the Senate tradition of up-or-down votes for judicial nominations reaching the Senate floor.

On May 23, 2005, a group of 14 senators, seven Democrats and seven Republicans, issued a "Memorandum of Understanding on Judicial Nominations." The Democrats' part of the pact was pledging to vote for cloture on three named judicial nominees and to oppose filibusters of future judicial nominations except in undefined "extraordinary circumstances." The Republicans' contribution was pledging to oppose changing Senate rules or procedures regarding judicial filibusters during the current 109th Congress.

They announced this deal on the eve of a Senate vote that would have eliminated the judicial filibuster altogether. Four times during the 108th Congress, the Senate failed to invoke cloture, or end debate, on the appeals court nomination of Priscilla Owen. Had that happened again on May 24, 2005, Frist would have sought a ruling from the presiding officer that, after sufficient debate, the Senate should vote on a judicial nomination. I would have joined a majority of my fellow senators in voting to affirm that ruling, re-establishing Senate tradition and making the judicial filibuster a thing of the past.

Recently dubbed the constitutional option, this is a mechanism for changing Senate procedures—without changing Senate rules—that has been used, directly or indirectly, for nearly a century. The filibuster deal was struck, in part, so that the constitutional option would not, at least for now, be exercised.

The operative words here are "for now." On its face at least, the deal fails to re-establish the Senate's tradition of up-or-down votes for all judicial nominations reaching the

Senate floor. Instead, it may effectively reduce the number of senators who can dictate which nominees receive floor votes to just the handful involved in this deal, since they can make or break the 60-vote threshold for invoking cloture, or ending debate, under Senate Rule XXII.

Loopholes in the Deal

Perhaps even worse, the deal does not even attempt to distinguish the "extraordinary circumstances" justifying future filibusters from the "extreme" standard Democrats say justified their past filibusters. Rather than confine the filibuster, this subjectivity creates loopholes large enough to drive a filibuster through.

The imperative to re-establish Senate tradition remains. This deal does not take the constitutional option for accomplishing this goal off the table. In fact, it was precisely the prospect of using the constitutional option in this very instance that prompted this agreement, including the promise to allow votes on nominees such as Priscilla Owen, Janice Rogers Brown and William Pryor. Some Republican signatories have already said that they will support the constitutional option if the deal's "extraordinary circumstances" loophole turns out to be a distinction without a difference compared to past practice. If we return to judicial filibusters—and we all know a Supreme Court vacancy looms—we will return to the constitutional option.

The judicial confirmation process needs to be fixed by returning to the tradition of up-or-down votes for judicial nominations reaching the Senate floor. This deal does not directly accomplish this goal, though it remains to be seen whether it might still do so in practice. I agree with Frist that, one way or another, whether by the self-restraint that once guided us or by the constitutional option, that tradition must return.

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